INTER-BUILDERS DEVELOPMENT PTE LTD., RE

HIGH COURT, SINGAPORE
S RAJENDRAN J
[COMPANIES WINDING-UP NO. 63 OF 1990]
18 JANUARY 1991

COMPANY LAW: *Winding-up - Just and equitable - Error in statutory demand - Effect of - Debt exceeding $2,000 - Merits of petition - Allegations of fraud - Whether company unable to pay its debts - Acrimony between shareholders - Companies Act [Sing], s. 254(2)(a).*

T, the former managing director of the company, applied to wind-up the company under s. 254 of the Companies Act (the Act) on the ground that it was unable to pay its debts. T claimed that the company owed him salaries, bonuses, directors' fees and loans.

The company opposed the petition on the basis that the statutory demand and petition were defective because there were errors in the figures stated in the statutory demand and petition.

The petition was also opposed on the grounds that:

(1) the debt was *bona fide* disputed;

(2) that the debt was not presently due as there was an agreement between the shareholders that their loans to the company would not be repaid until after the project account had been released;

(3) that there was a reasonable chance of obtaining payments without winding-up and that the petitioner did not have clean hands as there were allegations of fraud against T.

T's Counsel submitted that the errors were typographical. T also denied the allegations of breach of his duties contending that all material decisions were taken with the knowledge of all directors and shareholders.

Held:

[1] The error in the statutory demand does not render the demand defective and s. 254(2)(a) of the Act would operate if the petitioning creditor can establish that a sum exceeding $2,000 is due to him and he has made a demand for a sum in excess of $2,000 in the manner provided in s. 254(2)(a) which the debtor has neglected to pay.

[2] There were no substantial or *bona fide* grounds on which the company could institute a claim against T for the manner in which he managed the monies of the company and this was further compounded by the fact that the company had done nothing thus far to enforce its alleged claims against T.

[3] There were substantial grounds to say that there was an agreement between the shareholders in that their loans to the company would not be repaid until after the project account had been released. As the project account had not been released the liability of the company to repay the shareholders' loans had not arisen.

[4] In respect of the claim for outstanding salary, bonus and directors' fees, no documentary evidence was tendered to support the contention that there had been a similar agreement to defer payment of these items. Therefore out of the total sum of $167,990 claimed by T, except for the personal loan totalling $122,950, the balance of $45,040 is payable by the company to T.

[5] The company did not pay this debt as it was unable to do so; furthermore, other than the moneys in the project account, the company had virtually no funds and was therefore not able to meet its non-project account debts. This is a case where the company ought to be wound up.

[6] In the light of the acrimony between the shareholders, it is in the interest of all parties that the company be wound up, not only because it is unable to pay its debts but because it would be just and equitable to do so.

[Order accordingly.]

Cases referred to:
Cardiff Preserved Coal and Coke Company v. Norton [1167] LR 2 Ch App 405
Processed Sand Pty Ltd. v. Thiess Contracting Pty Ltd. [1983] NSWLR 384
Re Fabo Pty Ltd 14 ACLR 518
Re Pardoo Nominees Pty Ltd. 11 ACLR 573
Re Perusahaan Jenwatt Sdn. Bhd. [1990] 2 MLJ 178
Re Sanpete Builders (S) Pte Ltd. [1989] 1 MLJ 393
R v. Norfolk County Council [1891] 60 LJQB 379

Legislation referred to:
Companies Act 1965, s. 218(2)(a)
Companies Act [Sing], ss. 67, 68, 254(1), (2)(a)
Company Code (Tas) [Aust], s. 364(2)
Company Code (Vic) [Aust], s. 364(2)

For the petitioning creditor & all supporting creditors except No. 1 - Michael Kor; M/s. Michael Kor & Co.
For the debtor company - Siaw Kheng Boon; M/s. Tang & Co.

JUDGMENT

S Rajendran J:

This petition by Tang Ta Meng (Tang) under s. 254 of the Company's Act, Cap 50, for the winding-up of Inter-Builders Development Pte Ltd. (hereinafter called "the company") is based on the grounds that the company was unable to pay its debts and that it was just and equitable that the company should be wound up. Tang had by letter dated 5 January 1989 served on the company a demand for the sum of $168,590 in the manner provided for under s. 254(2)(a) of the Act. The company had failed to pay the said sum or any part thereof. The relevant parts of s. 254 read as follows:

> 254(1) The Court may order the winding-up if:
>
> (e) the company is unable to pay its debts;
>
> (i) the Court is of opinion that it is just and equitable that the company be wound up;
>
> (2) A company shall be deemed to be unable to pay its debts if:
>
> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding $2,000 then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorised requiring the company to pay the sum so due, and the company has for 3 weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

(b) execution or other process issued on a judgment, decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts; and in determining whether a company is unable to pay its debts the Court shall take into account the contingent and prospective liabilities of the company.

The company filed a motion seeking the dismissal of the petition. At the commencement of the hearing, Mr. Siaw acting for the company, drew the attention of the Court to the following errors in the statutory demand/petition:

(1) the total stated in the petition is $168,590 but when the individual figures are added up the total comes to $167,890;

(2) the figure for salary and bonus is stated as $5,640. In an affidavit filed on 11 August 1990 Tang has said that this figure is an error and should in fact be $5,040;

(3) the figure of $70,000 stated in the petition is erroneous. Tang in his affidavit of 11 September 1990 says that the correct figure should be $70,700;

and submitted, as preliminary issue, that these errors made the statutory demand and consequently the petition defective. He urged the Court to dismiss the petition on that ground. Counsel for the petitioner, Mr. Kor, submitted that there was in the present case no error in the total when the individual figures in the statutory demand are added up. The error arose in the petition only because of a typographical error in the petition where instead of typing the figure $70,700 (as given in the statutory demand) the typist had erroneously typed $70,000. The only error in the statutory demand was in the figure of $5,640 for salary and bonus. This ought to read $5,040 and consequently the total amount due ought to be $600 less, that is, $167,990 and not $168,590. The issue before me was whether such errors would render the statutory demand defective.

In *Cardiff Preserved Coal and Coke Company v. Norton* [1167] LR 2 Ch App 405 under similar provisions in the United Kingdom, a demand had been made by the creditor for £628 but the actual debt was only £411. In holding that in such a case the demand was not defective, Lord Chelmsford LC said, p. 410:

> It was contended that the winding-up order was bad because Mr. Hill had demanded a sum of £628, and it appeared that he was entitled only to £411 7s 9d; and the 67th and 68th sections of the Act make a company liable to be wound up only when a demand is made of a certain sum, and the company neglect to pay such sum, which in this case they were not bound to pay. But the liability of a company to be wound up under these provisions arises when a creditor, to whom the company is indebted above £50, serves a demand requiring the company to pay the sum so due, and the company for a certain time neglect to pay such sum. In this case there was a debt of more than £50 due to Mr. Hill. He made, it is true, a demand upon the company for payment of more than was due, but of course the amount due was known to the company, and was included in the demand, and the company neglected to pay "such sum", which means not the sum demanded, but the sum due, which they might have paid, and so have prevented the order being made. The construction contended for would make every winding-up order bad where the creditor had demanded the smallest sum above what was actually due to him.

The provisions in respect of statutory demands under the Australian Companies Act are also similar to the provisions under our Act. There was a conflict of authorities in Australia as to whether an error in the statutory demand would render the demand defective. In the case of *Re Pardoo Nominees Pty Ltd*. 11 ACLR 573, the plaintiff had pursuant to s. 364(2) of the Companies (TAS) Code served a demand on the defendant company for $176,431.40.

The defendant failed to comply with the demand. However, the actual amount owing at the date of the demand was only $172,434.81. The question before the Court (in Tasmania) was whether the plaintiff had established the requirements for deemed insolvency under s. 364(2) of the Code. Cosgrave J said at p. 575 of the report:

> If the word "deemed" was used to create a statutory fiction then strict proof would be required of the basic facts which must exist in order to prove the existence of the 'fictional fact'. But if the word is used to indicate that the draftsman has listed the available avenues whereby the requisite conclusion may be reached (see Cave J in *R v. Norfolk County Council* [1891] 60 LJQB 379 at 381) interpretation of the section is not so constrained, and one may approach it in a practical rather than an exacting frame of mind. In the case of the subsection under review, it is plain that para. (c) certainly, and, almost as certainly, para. (b) contain not the slightest suggestion of fiction. If the facts in para. (c) are established, the requisite conclusion is reached without any further step. The "deeming" adds nothing to it. If the facts in para. (b) are established the requisite conclusion would surely follow without any reference to "deeming". Proof of the facts in para. (a) does not lead inexorably to the requisite conclusion but, in the absence of contention, would go a long way towards it. Some help is needed from the deeming provision but only to the extent that the words "deemed to be" are interpreted as meaning "shall be sufficient proof that the company is". I rule, therefore, that the conclusion stated at the end of the subsection is not a statutory fiction, and that the purpose of the subsection is to list methods of proof.

A contrary view was taken in the New South Wales case of *Processed Sand Pty Ltd. v. Thiess Contracting Pty Ltd.* [1983] NSWLR 384. There, Waddel J in refusing to follow the decision in *Re Pardoo N Nominees Pty Ltd.* said:

> But there are, in my opinion, much stronger considerations which indicate that the provision should be given a literal interpretation. Its effect is to provide a statutory admission that a company is unable to pay its debts. One would expect such an admission to be created only if the amount claimed by the notice of demand and not paid or secured or compounded for to the reasonable satisfaction of the creditor was an amount either admittedly due or one as to which there was no real dispute as to liability. It would seem arbitrary and unjust to create an admission arising on failure to pay ... a debt, a part of which was not due.

The conflicting authorities in Australia were considered recently in the Supreme Court of Australia in the case of *Re Fabo Pty Ltd.* 14 ACLR 518. There the plaintiff had sought an order for the winding up of the company on the ground that it was unable to pay its debts, relying on the company's failure to comply with a notice served on it pursuant to s. 364(2) of the Companies (Vic) Code. The notice demanded payment of $131,469.82 comprising a judgment debt and interest thereon and an amount of $19.60 being costs in the issue of the summons. At the hearing it emerged that no order had been made in respect of the costs of $19.60 and that this sum was not recoverable. The notice therefore overstated the sum due. The master referred to a Judge, who in turn referred to the full Court the question whether in the circumstances a winding-up order could or should be made. The full Court adopting the decision in *Re Pardoo* held that in the concluding words of s. 364(2), "the company shall be deemed to be unable to pay its debts" the word "deemed" does not create a statutory fiction of insolvency and that accordingly overstatement in the notice of demand of the amount due does not destroy the validity of the notice.

In the Malaysian case of *Re Perusahaan Jenwatt Sdn. Bhd.* [1990] 2 MLJ 178, the statutory demand was for a sum of RM295,584.46 but the amount in fact owing was only RM29,584.46. In that case Zakaria Yatim J refused to follow the decision of the full bench in *Re Fabo*. Instead he specifically adopted the passage in the judgment of Waddel J in *Processed Sand Pty Ltd.* quoted above and held that a literal interpretation should be given to the similar provisions in s. 218(2)(a) of the Malaysian Companies Act.

The validity of a statutory notice where part of the amount claimed is disputed but where the undisputed part exceeded the prescribed minimum of $2,000 was considered in the Singapore Courts by Chao Hick Tin JC (as he then was) in *Re Sanpete Builders (S) Pte Ltd.* [1989] 1 MLJ 393. Chao Hick Tin JC decided the case on other grounds but went on to consider the two lines of authorities on the point and stated at p. 402 of the report:

> As stated above, this issue does not arise here and I need not decide it though I would be inclined to take the view that what was stated in *Cardiff Preserved Coal* is the correct interpretation of the law and that so long as a debtor refuses to pay a sum which is not in dispute and that sum is in excess of the minimum prescribed in s. 254(2)(a), there is neglect to pay within the meaning of that provision. The decision in *Processed Sand* seems to have proceeded on a wrong premise and this was explained by Cosgrove J in *Re Pardoo Nominees Pty Ltd.* at pp. 575-576.

I would respectfully differ from the decision of Zakaria Yatim J and Waddel J and would follow the decisions in *Cardiff Preserved Coal and Coke Co. v. Norton*, *Re Pardoo Nominees Pty Ltd.*, *Re Fabo Pty Ltd.* and *Re Sanpete Builders (S) Pte. Ltd.* In my view s. 254(2)(a) would operate if the petitioning creditor can establish that a sum exceeding $2,000 is due to him from the company and he has made a demand for a sum in excess of $2,000 in the manner provided in s. 254(2)(a) which the debtor has neglected to pay. To hold otherwise would, in the words of Lord Chelmsford quoted above:

> make every winding-up order bad where the creditor had demanded the smallest sum above what was actually due to him.

Accordingly, I find no merit in the preliminary issues raised by Mr. Siaw and have to consider the petition on its merits.

The company was incorporated on 3 January 1980 with a paid-up capital of $1 million. It was formed in order to acquire a piece of land at J Dermawan, develop a condominium on it, and sell the units in the condominium for profit. Tang, his sister, Mdm Tang Sow Keng and his brother, Tang Tat Cheong, together held 40% of the share capital. Tai Choi, his wife, Mdm Poh and his mother-in-law, Mdm Lee, also held 40% whilst the balance of 20% was held by one Mdm Yu.

Tang was the managing director of the company from its inception. As a result of misunderstandings amongst the shareholders, Tang resigned as managing director in February 1987, was re-appointed on 23 October 1987. On 15 May 1989, Tang resigned as a director of the company and commenced these proceedings on 27 March 1990. The board of directors of the company at present consists of Tai Choi and his wife, Mdm Poh.

The petition was opposed by the company on the grounds that the debt was *bona fide* disputed; was not presently due; there was a reasonable chance of obtaining payments without winding up and that the petitioner did not have clean hands.

Tai Choi in his affidavit filed on behalf of the company claimed that management, control and conduct of the company's affairs and operations had until November 1987 been solely in the hands of Tang. After November 1987 when the management of the company was taken by the other directors, it was discovered that Tang had mismanaged the company and caused serious detriment to the company. Tai Choi claimed that the company had a cause of action against Tang for, *inter alia*, breach of his duties as a director. He stated that company will be instituting a claim against Tang which claim would be far in excess of Tang's alleged claim against the company. In support of these allegations, Tai Choi alleged that:

(a) receipts had been issued for a total sum of $237,000 in respect of Pte Lot No. 4 but of this sum $118,500 could not be accounted for;

(b) receipts totalling $390,000 had been issued in respect of Pte Lot 12 to the purchaser Thasin Development Pte Ltd. (Thasin), a company controlled by Tang, but of this sum only $65,000 could be accounted for.

Tang denied these allegations. Tang pointed out that the management of the company was at all times vested in the board, that all material decisions were taken with the knowledge of all directors and shareholders and that as he and his family held only 40% of the capital of the company it could not be said that he had control of the board. As for the alleged mismanagement in relation to the two specific lots Tang gave the following explanation:

Pte Lot 4

The company was fully aware that the $118,500 was paid into the non-project account of the company. To evidence this, Tang exhibited copies of two letters signed by Tang and Tai Choi as directors dated 24 July 1987 and 3 August 1987 addressed to M/s. S M Wong & Lim, the company's solicitors in the sale of Lot 4 wherein the company confirmed receipt of $237,000. Tang claimed that the $118,500 was comprised in the $237,000. Tang also stated that the purchaser of Lot 4 was suing the company in the High Court Suit 2036/89 and that if the company was serious in its contentions that he had in some way misappropriated any sum it should have joined him as a party to the suit.

Pte Lot 12

The company (and all shareholders including Tai Choi) was fully aware of the practice of issuing receipts before the cheques presented were cleared. This also happened in respect of Lots purchased by M/s Chee Wah Engineering Pte Ltd. where at the request of Tai Choi receipts were issued for cheques that were subsequently dishonoured. In respect of Lot 12, the intended purchaser, Thasin, had paid a booking fee of $66,000 but because the company was strapped for cash, this sum was paid into the company's current account and not into the project account. The company treated this payment as a loan from directors. Thasin subsequently paid the 2nd instalments of $65,000 and this was paid into the project account. The total amount the company had received from Thasin amounted to 20% of the purchase price. The sale agreement with Thasin had been repudiated and the company was therefore entitled to forfeit the 20% paid. There could therefore be no claim either against Thasin or Tang in respect of Lot 12.

On the evidence before me I was satisfied that there were no substantial or *bona fide* grounds on which the company could found a claim against Tang in respect of the way in which he managed monies paid to the company in respect of Pte Lot 4 and Lot 12 or in respect of the other instances of mismanagement and breaches of duty alleged. This view is supported by the fact that the company has for such a long period of time done nothing to enforce its alleged claims against Tang.

Tai Choi in his affidavits denied that the company owed Tang any outstanding salary, bonus, directors' fees or loans. He also stated that Tang's claims could not be verified by the company as most of the accounts, receipts and files relating thereto were not surrendered to the company by Tang. He then went on to say that "even if these claims were agreed to" it was agreed by all the directors and shareholders of the company that the claims would not be deemed to be due and payable until after the project had been finally completed. In respect of this contention, Tai Choi referred to:

(a) the minutes of board of director meeting held on 12 September 1985 which stated:

> Further the company will arrange to pay the directors their laons to the company by claiming from the company's project account, if funds are available from the said account and overseas union trust has no objections to the withdrawal.

(b) a letter dated 19 March 1986 from M/s. Michael Kor & Co., who were then the solicitors for the company, to M/s. Tang & Co., the solicitors acting for Tai Choi, whereby in refusing to make immediate repayment of a loan made by Tai Choi to the company, M/s. Michael Kor & Co. say:

> We are instructed that it was a term of the said loan, agreed to by the parties, that the same was not to be discharged until and unless there is sufficient fund in the company account to pay for operating costs or when the project account is released. Accordingly, our clients deny that the said sum has accrued or is due and owing to your client.

(c) the minutes of board meeting of the company held on 15 December 1987 wherein under the heading "Refund of Loans by Directors and shareholders", it was recorded:

> This matter was tabled and discussed and after due deliberation it was agreed by all present that loans from directors and shareholders to the company shall be refunded to them at the end of the project, that is, after the project had been completed and all outside creditors fully settled. It was also agreed that amounts advanced in addition to the percentage required to be advanced by each director and shareholder shall be repaid in full.

Tang denied that there was any such agreement to defer the repayment of the loans. With regard to the minutes of the board meetings of 12 September 1985 and 15 December 1987, Tang pointed out that some of the shareholders were not present at the meetings and any decisions would not therefore be binding. As for the letter dated 19 March 1986 from M/s. Michael Kor & Co. to M/s. Tang & Co., Tang states that at the time when the company instructed Michael Kor & Co. to write the letter there was simply no funds in the project account to pay Tai Choi.

I am satisfied that there are substantial grounds to say that there was an agreement between the shareholders that their loans to the company would not be repaid until after the project account had been released. This is reflected in M/s. Michael Kor's letter of 19 March 1986 which was sent at a time when Tang was the managing director of the company. It would be difficult for Tang to now resile from the position. As the project account has as yet not been released the liability of the company to repay the shareholder's loans would not have arisen.

In respect of the claim for outstanding salary, bonus and directors' fees no documentary evidence was tendered to support the contention that there had been a similar agreement to defer payment of these items. I find no merit in the company's claim that the books of the company had not been returned by Tang and that these sums had not been paid because Tang's claims could not be verified. In the event I find that of the total sum of $167,990 claimed by Tang, except for the personal loans totalling $122,950, the balance of $45,040 is payable by the company to Tang. I am satisfied that the company did not pay this debt because it was unable to do so. I am also satisfied that other than for moneys in the project account, the company had virtually no funds and was therefore not able to meet its non-project account debts. The company has not been able to persuade me that I should exercise my discretion in its favour. In all the circumstances, I am of the view that this is a case where the company ought to be wound up and I so order.

The two main protagonists in this matter, namely Tang and Tai Choi have filed voluminous affidavits and exhibited numerous documents in support of their respective positions. Tai Choi, in his affidavits, has made very grave allegations of misconduct and even fraud against Tang. On the evidence before me I am not satisfied that there is sufficient basis for making such allegations. In so far as the non-payment of purchase moneys into the project account is concerned, it appears that such non-payment was necessitated by the company's tight cash situation and purchase moneys not paid into the project account were used to finance the company's operations. The evidence indicates that both Tang and Tai Choi were parties to such conduct.

The accusations made by Tai Choi in these affidavits are such that it is clear that the acrimony between the shareholders is such that they can no longer work together. The company is in substance a partnership. It was formed for the purpose of developing condominium units on a piece of land and selling the units built for profit. The condominium has been built and all the units have either been sold or contracted to be sold. In view of the strained relationship between the shareholders, I am satisfied that it is in the interest of all parties that the company be wound up. In this respect I note that all the creditors who gave notice of their intention to appear at this hearing support the petition. In the circumstances I am granting this petition for the winding up of the company not only because the company is unable to pay its debts but also because, in my view, it is just and equitable to do so.

Also found at [1991] 2 CLJ 1448